

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

**ROBERT J. HALL
556 ADRIAN ST.
WATERLOO, IA 50703-5212**

**B&B MANUFACTURING, INC.
TRACI BERRY
1301 PINE ST.
JANESVILLE, IA 50647**

**DIA APPEAL NO. 21IWDUI0145
IWD APPEAL NO. 20A-UI-10646**

**ADMINISTRATIVE LAW JUDGE
DECISION**

APPEAL RIGHTS:

This Decision Shall Become Final, unless within fifteen (15) days from the mailing date below the administrative law judge's signature on the last page of the decision, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to:

***Employment Appeal Board
4th Floor – Lucas Building
Des Moines, Iowa 50319
or
Fax (515) 281-7191***

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

AN APPEAL TO THE BOARD SHALL STATE CLEARLY:

The name, address and social security number of the claimant.

A reference to the decision from which the appeal is taken.

That an appeal from such decision is being made and such appeal is signed.

The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

SERVICE INFORMATION:

A true and correct copy of this decision was mailed to each of the parties listed.

ONLINE RESOURCES:

UI law and administrative rules: <https://www.iowaworkforcedevelopment.gov/unemployment-insurance-law-and-administrative-rules>

UI Benefits Handbook: <https://www.iowaworkforcedevelopment.gov/unemployment-insurance-benefits-handbook-guide-unemployment-insurance-benefits>

Handbook for Employers and forms: <https://www.iowaworkforcedevelopment.gov/employerforms>

Employer account access and information: <https://www.myiowaui.org/UITIPTaxWeb/>

National Career Readiness Certificate and Skilled Iowa Initiative: <http://skillediowa.org/>

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

ROBERT J. HALL
Claimant

B&B MANUFACTURING INC.
TRACI BERRY
Employer

DIA APPEAL NO. 21IWDUI0145
IWD APPEAL NO. 20A-UI-10646

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 05/17/20
Claimant: Appellant (2)

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.5(1) – Voluntary Quitting

STATEMENT OF THE CASE:

The claimant filed an appeal from the August 25, 2020 (reference 01) unemployment insurance decision that denied benefits based upon his separation from employment. The parties were properly notified of the hearing. A telephone hearing was held on October 6, 2020. The claimant, Robert J. Hall, participated and presented testimony. The employer, B&B Manufacturing, Inc., participated through Human Resources Office Manager, Traci Berry, Owner Larry Borglum, and Plant Manager Koby Despard. Berry and Despard testified on behalf of the employer. Official Notice was taken of the administrative file, which included the notice of telephone hearing, the transmittal form transmitting this case to DIA, the decision at issue herein, and the appeal request. In addition, Claimant submitted proposed Exhibit 1, which was admitted as evidence without objection. Employer submitted proposed Exhibits A, B, C, D, E, H, I, K and L, which were admitted as evidence. The remainder of Employer's proposed exhibits, F, G, and J, were withdrawn by the Employer at hearing. The admitted exhibits will be referred to below by their title or description, rather than exhibit number, to avoid confusion.

ISSUES:

Did claimant voluntarily quit the employment with good cause attributable to employer?
Was the claimant discharged for disqualifying job-related misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds:

Robert Hall began his employment with B&B Manufacturing, Inc. on February 25, 2019, working full time as a painter, prepping, priming and top-coating industrial tanks that farmers use for fuel. (Hall testimony) The Company provided him with an employee manual at the time of hire. Hall signed his acknowledgment of receipt of the policy on April 29, 2019. (Exh. K, Progressive Discipline Policy signature page).

In the manual, employees were advised regarding the company's policy regarding absenteeism, which stated:

You are expected to be at work every day unless you have previously scheduled time off. If you are unable to work due to illness or other circumstances, you must call in within 30 minutes of your scheduled start time. After 60 minutes from your scheduled start time it will be considered a no call no show. Two consecutive no call no shows will constitute termination.

(Exh. L, Progressive Discipline Policy at p. 4).

Human Resource/Office Manager Traci Berry testified at hearing that the company would discharge an employee after three consecutive no call no shows. Hall testified that he also believed the policy to be three no call no shows. (Berry testimony; Hall testimony).

Claimant was disciplined on March 23, 2020 for attendance issues and was issued a written employee corrective action. He was warned that over the past year there had been over 50 attendance occurrences. It listed previous corrective actions as conversations between Claimant and his supervisor about his attendance. Claimant was placed on 90-day probation and was warned that further occurrences could lead to corrective action up to and including termination. There were no occurrences between March 24, 2020 and April 20, 2020. On April 20, 2020, Hall was noted to be an unexcused tardy, arriving half an hour late. On April 21, 2020, he was listed as being absent and would be seeing the doctor the next day. (Exh. C, Employee Corrective Action; Exh. B, Calendar entries between March 17, 2020 and June 15, 2021).

Hall testified that he suffers from MS and during the months in question, he was struggling with hernia issues that resulted in surgery, which took place on April 22, 2020. His treating physician completed the disability request form indicating Hall would be continuously totally disabled from April 22, 2020 through June 8, 2020. (Exh. A, Group Disability Claim Form; Hall testimony).

On May 14, 2020, Dr. Matthew Glascock prepared a release allowing Hall to return to work with a 15 pound weight restriction until May 31, 2020, and no restriction commencing June 1, 2020. A second release was written by Dr. Glascock on May 28, 2020 revising the restrictions by stating Hall could return to work on June 1, 2020 with a 15 pound weight restriction until June 15, 2020, after which he could return to normal duty. (Exh. I, Glascock letters 5/14/20 and 5/28/20).

On May 18, 2020, the Employer's calendar records noted Hall was laid off until June 1, 2020 and was to return to work on June 2, 2020. On June 2, 2020, he was reported as absent, stating he was sore, could not stand straight, and would be back tomorrow. It further stated he may have to do half days for a week or so. There is no indication Hall was absent on June 3, 2020 on this calendar. On June 4, 2020 he had an unexcused absence as he called in late to report it. Hall reported that he didn't make it home yesterday because his bike quit on him and he was going to the emergency room. On June 5, 8 and 9, Hall did call in to report his absence and was not considered a no call, no show for those dates. (Exh. B, Calendar entries from March 17, 2020 through March 16, 2021 at pp. 2 - 3).

Hall stated he met with Berry, Owner, Larry Borglum, and Plant Manager, Koby Despard on June 8, 2020. He told them he would need to take two weeks to heal from his hernia surgery. He stated he could not paint any more as it was too hard on his body. They told him they would find a different spot for him but he would still have to paint until they found a replacement. He stated he told them he could not paint anymore. He thought they were okay with him taking the next two weeks off. Berry told him he would need to get a doctor's excuse stating that. Hall stated he figured he would just call in the next two weeks and not be a painter. Hall stated he

notified the employer every day between June 10 and June 16, 2020 that he would not be coming in, but stated he was having issues with his phone service around this time and they might not have gone through. He then stated if he didn't have texts from the 15th and 16th, he probably didn't call in on those dates, but he did call in on the other dates. When he met with them on the 8th, he could not provide them with a doctor's note because he would not be meeting with the doctor until the 23rd of June. He did acknowledge going to the emergency room on June 4, 2020 but he didn't stay because they would not allow his girlfriend to come in with him due to COVID-19. He then went to a second emergency room and they said it was appendicitis, which made him angry so he left. (Hall testimony).

Employer's calendar further shows that on Wednesday June 10, 2020 through Tuesday, June 16, 2020, five working days, Hall was a no call no show. Berry agreed that texting the employer was an appropriate way of notifying them and would not have been considered a no call no show. (Exh. B, Calendar entries from March 17, 2020 through March 16, 2021 at pp. 2 - 3; Berry testimony).

On June 16, 2020, Employer terminated Hall in writing. Traci Berry wrote in the termination letter that Hall had received a written warning about attendance on March 24, 2020. She further stated their records indicated Hall did not show up for work and failed to contact Employer regarding his absences from work on June 10, 11, 12, 15, and 16. She stated this was in direct violation of their call-in policy and that absence without notification for 3 consecutive days is considered job abandonment and voluntary resignation. On that basis, she stated they were terminating his employment. (Exh. H, Berry letter dated 6/16/20).

IWD determined by Decision issued August 25, 2020, that Hall had voluntarily quit work on 6/12/20 by failing to report to work for three days in a row and not notifying his employer of the reason. (Decision, Ref. 01).

Hall submitted texts between himself and his employer, that were printed out on June 13, 2020. They show that at 6:19 a.m. on Wednesday, Hall wrote that he would not be in as his vehicle had broken down. This presumably, was June 10, 2020, the Wednesday prior to June 13, 2020. It did not show the "sent" designation next to the text. Hall then wrote on Thursday, June 11, 2020 at 8:12 p.m. that he would not be in today. This was after his start time for the day and likewise did not indicate it was "sent." On June 12, 2020, he sent a text at 5:52 a.m. stating he would not be in that day. This was prior to the start of his work day and indicates it was sent. Hall had no texts from Monday June 15 or Tuesday June 16, 2020 to demonstrate that he contacted his employer on those dates. (Exh. 1, text messages).

REASONING AND CONCLUSIONS OF LAW:

For the reasons outlined below, the administrative law judge concludes as follows:

Hall was determined to have voluntarily quit his employment for having three consecutive no call no shows. He was then terminated by his employer due to his job abandonment and excessive absenteeism. The first question is whether Hall abandoned his employment due to having three consecutive no call no shows.

Iowa Code § 96.5(1) provides:

An individual shall be disqualified for benefits:

1. Voluntary quitting. If the individual has left work voluntarily without good cause attributable to the individual's employer, if so found by the department.

A voluntary quitting means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer and requires an intention to terminate the employment. *Wills v. Emp. Appeal Bd.*, 447 N.W.2d 137, 138 (Iowa 1989). A voluntary leaving of employment requires an intention to terminate the employment relationship accompanied by an overt act of carrying out that intention. *Local Lodge #1426 v. Wilson Trailer*, 289 N.W.2d 608, 612 (Iowa 1980); *Peck v. Emp. Appeal Bd.*, 492 N.W.2d 438 (Iowa Ct. App. 1992).

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Dep't of Job Servs.*, 275 N.W.2d 445, 448 (Iowa 1979).

Iowa Admin. Code r. 871-24.25(4) provides:

Voluntary quit without good cause. In general, a voluntary quit means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer from whom the employee has separated. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to Iowa Code § 96.5. However, the claimant has the initial burden to produce evidence that the claimant is not disqualified for benefits in cases involving Iowa Code § 96.5, subsection (1), paragraphs "a" through "i," and subsection 10. The following reasons for a voluntary quit shall be presumed to be without good cause attributable to the employer:

(4) The claimant was absent for three days without giving notice to employer in violation of company rule.

In this case claimant was absent from work on three consecutive days, however Hall provided satisfactory evidence that on June 11, 2020, he did provide notice that he would be absent and therefore he did not have three consecutive no call no shows. He further provided credible evidence that he had no intention of quitting his employment. For these reasons the undersigned finds Hall did not voluntarily resign his position. The question remains as to whether Hall was terminated for disqualifying misconduct.

Iowa Code § 96.5(2)(A) provides:

An individual shall be disqualified for benefits:

2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:
 - a. The individual shall be disqualified for benefits until the individual has worked in and has been paid wages for insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

Iowa Admin. Code r. 871-24.32(1)(a) provides:

Discharge for misconduct.

(1) Definition.

a. "Misconduct" is defined as a deliberate act or omission by a worker which constitutes a material breach of the duties and obligations arising out of such worker's contract of employment. Misconduct as the term is used in the

disqualification provision as being limited to conduct evincing such willful or wanton disregard of an employer's interest as is found in deliberate violation or disregard of standards of behavior which the employer has the right to expect of employees, or in carelessness or negligence of such degree of recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. On the other hand mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not to be deemed misconduct within the meaning of the statute.

Iowa Admin. Code r. 871-24.32(7) provides:

(7) Excessive unexcused absenteeism. Excessive unexcused absenteeism is an intentional disregard of the duty owed by the claimant to the employer and shall be considered misconduct except for illness or other reasonable grounds for which the employee was absent and that were properly reported to the employer.

Unemployment statutes "should be interpreted liberally to achieve the legislative goal of minimizing the burden of involuntary unemployment." *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6, 10 (Iowa 1982). The employer has the burden of proof in establishing disqualifying job misconduct. *Id.* at 11. Excessive absences are not considered misconduct unless unexcused. *Id.* at 10. Absences due to properly reported illness cannot constitute work-connected misconduct since they are not volitional, even if the employer was fully within its rights to assess points or impose discipline up to or including discharge for the absence under its attendance policy. *Gaborit v. Emp. Appeal Bd.*, 743 N.W.2d 554 (Iowa Ct. App. 2007). Medical documentation is not essential to a determination that an absence due to illness should be treated as excused. *Id.* at 558.

"Excessive unexcused absenteeism is an intentional disregard of the duty owed by the claimant to the employer and shall be considered misconduct except for illness or other reasonable grounds for which the employee was absent and that were properly reported to the employer." Iowa Admin. Code r. 871-24.32(7); see *Higgins v. Iowa Dep't of Job Serv.*, 350 N.W.2d 187, 190, n. 1 (Iowa 1984) (holding "rule [2]4.32(7)...accurately states the law."). The requirements for a finding of misconduct based on absences are therefore twofold. First, the absences must be excessive. *Sallis v. Emp. Appeal Bd.*, 437 N.W.2d 895 (Iowa 1989). The determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. *Higgins*, 350 N.W.2d at 192. Second, the absences must be unexcused. *Cosper*, 321 N.W.2d at 10. The requirement of "unexcused" can be satisfied in two ways. An absence can be unexcused either because it was not for "reasonable grounds," or because it was not "properly reported." *Higgins*, 350 N.W.2d at 191; *Cosper*, 321 N.W.2d at 10. Excused absences are those "with appropriate notice." *Cosper*, 321 N.W.2d at 10.

The term "absenteeism" also encompasses conduct that is more accurately referred to as "tardiness." An absence is an extended tardiness and an incident of tardiness is a limited absence. *Higgins*, 350 N.W.2d at 190. Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping are not considered excused. *Id.* at 191.

Excessive absenteeism has been found when there has been seven unexcused absences in five months; five unexcused absences and three instances of tardiness in eight months; three unexcused absences over an eight-month period; three unexcused absences over seven months; and missing three times after being warned. See *Higgins*, 350 N.W.2d at 192; *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984); *Armel v. Emp. Appeal Bd.*, No. 07-0463, 2007 WL 3376929, at*3 (Iowa Ct. App. Nov. 15, 2007); *Hiland v. Emp. Appeal Bd.*, No. 12-2300, 2013 WL 3458145 (Iowa Ct. App. July 10, 2013); and *Clark v. Iowa Dep't of Job Serv.*, 317 N.W.2d 517 (Iowa Ct. App. 1982). Excessiveness by its definition implies an amount or degree too great to be reasonable or acceptable. Two absences would be the minimum amount in order to determine whether these repeated acts were excessive. Furthermore, in the cases of absenteeism it is the law, not the employer's attendance policies, which determines whether absences are excused or unexcused. *Gaborit*, 743 N.W.2d at 557 - 58 (Iowa Ct. App. 2007).

Here it is undisputed that Hall was previously warned about his absenteeism. Following the March 23, 2020 discipline, Hall had no absences until he began to suffer from issues relating to his hernia in late April of 2020. In fact, he had surgery on April 22, 2020 and did not return to work until June 2, 2020. After that time, as noted, his unreported absences in June included June 4, 2020, in which he indicated he was going to go to the emergency room; June 15 and June 16, 2020. Hall provided sufficient evidence that he reported his absences for June 10 and June 12, 2020. His absence for June 11, 2020 was reported but not timely reported. In short, these few absences, especially in light of the significant health issues he was experiencing, do not rise to the level of misconduct.

For these reasons, the undersigned concludes that Hall's request for benefits must be granted.

DECISION:

The August 25, 2020 (reference 01) unemployment insurance decision is reversed. Claimant will be allowed benefits provided he is otherwise eligible.



Tricia A. Johnston
Administrative Law Judge

October 16, 2020
Decision Dated and Mailed

TAJ/lb

CC: Robert Hall (by First Class Mail)
B&B Manufacturing, Inc. (by First Class Mail)
Nicole Merrill, IWD (By Email)
Joni Benson, IWD (By Email)